STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
(Cooper, Fort Hood and R.S. Gribbs, JJ.)

JAMES D. AZZAR,

Plaintiff-Appellant, and

PROCESSING SOLUTIONS, LIMITED,

Plaintiff,

vs.

THE CITY OF GRAND RAPIDS,

Defendant-Appellee, and

BERNARD C. SCHAEFER, and
ROBERT J. KRUIS,

Defendants.

/

Supreme Court Docket No.: 130310

Court of Appeals Docket No.: 260438

Kent County Case No.: 03-11760-NZ

BRIEF ON APPEAL OF PLAINTIFF-APPELLANT JAMES D. AZZAR

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING JURISDICTION

Plaintiff-Appellant James D. Azzar appeals by leave granted by this Court by order entered May 4, 2006. This Court has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

From 1974 until July 31, 2001, the State Construction Code Act ("State Act") contained a limited ability for municipalities to "opt out" of following and enforcing the State Act and the State Construction Code ("the Code"). The "opt out" was expressly limited, however, and required the municipality to adopt other nationally recognized codes which could be modified by the municipality subject to the approval of the State of Michigan. Effective July 31, 2001, the limited "opt out" was removed from the State Act and replaced by the unequivocal mandate of state-wide, uniform application of the State Act and the Code, including the Michigan Building Code. The State Act and the Michigan Building Code expressly preempt local regulation concerning their subject matter. The State Act mandates that the Michigan Building Code insure adequate building maintenance, and the Michigan Building Code adopts by reference the International Property Maintenance Code as expressly authorized by the State Act, thereby fulfilling the legislative mandate that the Code insure adequate building maintenance. The question presented is:

WHETHER THE GRAND RAPIDS BUILDING MAINTENANCE CODE IS PREEMPTED BY THE STILLE-DEROSSETT-HALE SINGLE STATE CONSTRUCTION CODE ACT, MCL 125.1501, ET SEQ., AS AMENDED BY PUB ACTS 1999, NO. 245.

Plaintiff-Appellant James D. Azzar answers, "Yes".

Defendant-Appellee City of Grand Rapids answers, "No".

The circuit court answered, "No".

The Michigan Court of Appeals answered, "No".

STATEMENT OF FACTS

I. INTRODUCTION AND OVERVIEW.

Plaintiffs initiated this action on December 16, 2003 seeking damages and equitable relief for violations of their constitutional rights by defendants. Each of the alleged violations of plaintiffs' constitutional rights arises from enforcement activities commenced by defendants to compel plaintiffs to take action regarding a structure known as Engine House No. 6, a fire station constructed by the defendant City of Grand Rapids ("City") beginning in 1877 and completed in 1879, at which time it was commissioned as an active fire station.[1] The Engine House was acquired by plaintiff Processing Solutions, Limited, on June 25, 1998 from the City.

In their complaint, plaintiffs asserted that the City is liable under 42 U.S.C. § 1983 for: (1) imposing building maintenance standards through an ordinance (the City's Building Maintenance Code, Chapter 135 of the City Code) the City knows to be illegal and the City's enforcement of such standards through Notices to Repair and criminal prosecution;[2] (2) criminalizing alleged violations of the City's Historic Preservation Commission Ordinance when the enabling statute, Local Historic Districts Act, MCL 399.201, et seq., specifically provides for a civil penalty;[3] and (3) and for the City's role in obtaining an illegal search warrant based on the State Construction Code Act, MCL 125.1501, et seq., when the City failed to satisfy the statutorily imposed condition precedent of passing an ordinance to assume enforcement responsibility from the State.[4] Plaintiffs also asserted in Count VIII of their complaint a malicious prosecution action against the City, asserting that the criminal proceeding brought

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1 Complaint, ¶ 9, Apx 192a

2 Counts I and II of the Complaint, Apx 229a-238a.

3 Count III of the Complaint, Apx 235a-238a.

4 Count V of the Complaint, Apx 241a-243a.

against Mr. Azzar were initiated without probable cause, with malicious intent and for the primary purpose of bringing prosecution rather than bringing Mr. Azzar to justice.

In Count IV of the Complaint, Plaintiff Processing Solutions, Ltd, also asserted claims against Assistant City Attorney Bernard Schaefer and Building Inspector Robert Kruis for violating its Fourth Amendment rights: (1) by demanding an unspecified inspection of its property while refusing to identify the legal basis for the inspection demand and refusing to identify what would be inspected, who would perform the inspection and for what purpose; (2) for their improper motivation in contriving circumstances in a planned effort to illegally search plaintiff's property; (3) for their steadfast refusal to consider information provided by plaintiff, who was forced to guess and shadow-box what the City's complaints might be (in light of their refusal to articulate them); (4) attorney Schaefer's improper advice and counsel given to inspector Kruis, including his attorney Schaefer's participation in the investigation of plaintiff's property; (5) for refusing to consider third-party corroborating evidence to satisfy the demand for an undefined inspection; and (6) for their drafting of a knowingly false and wholly misleading affidavit, all of which was done in an effort to illegally and improperly obtain and execute a search warrant in violation of plaintiff's Fourth Amendment rights.

Lastly, in Counts VI and VII of their complaint, plaintiffs sought declaratory and injunctive relief precluding the City from enforcing the City's Building Maintenance Code, which plaintiffs asserted had been preempted by State law, and precluding the City from imposing the criminal penalties provisions of the Grand Rapids Historical Preservation Commission Ordinance, which plaintiffs asserted were preempted by the State Local Historic Districts Act.

On April 20, 2004, plaintiffs moved the circuit court for partial summary disposition on the issue of express preemption, arguing that the Grand Rapids Building Maintenance Code was preempted by State law and unenforceable. The matter was fully briefed, and oral argument was heard on May 24, 2004. Subsequent to the oral argument, the parties scheduled and engaged in facilitative mediation as a result of encouragement from the circuit court. Facilitative mediation resulted in the resolution of all issues in the case, save those raised in plaintiffs' Motion for Partial Summary Disposition on the Issue of Express Preemption and by the City in opposition thereto.

On November 5, 2004 and in accordance with the parties' settlement agreement, the parties filed a Stipulation Dismissing Certain Claims and Parties along with a proposed order effectuating the stipulation. (**Apx 283a-289a**). The Stipulation provides in pertinent part:

> 6. The parties agree that the issues raised in plaintiffs' motion for partial summary disposition and in defendants' opposition to plaintiffs' motion for partial summary disposition present questions of law for resolution by this Court, and that to the extent that defendants' opposition may suggest the existence of a question of fact, those suggestions and arguments are hereby withdrawn by defendants.
>
> 7. The parties have resolved all other disputes and issues between them and respectfully request that this Court rule on Plaintiffs' Motion for Partial Summary Disposition Concerning the issue of Express Preemption dated April 20, 2004, opposed by Defendants by brief dated May 5,2004, and argued to the Court on May 12, 2004 (hereinafter "the Preemption Motion").
>
> 8. In anticipation of the Court's ruling on the Preemption Motion and in furtherance of their settlement agreement, the parties have prepared and signed two judgments, one judgment is entitled "Judgment in Favor of Plaintiff" and the other judgment is entitled "Judgment in Favor of Defendant." Both judgments are filed **under seal**.
>
> 9. In the event the Court rules that the City's Building Maintenance Code is preempted by state law, the Court shall then open and enter the Judgment in Favor of Plaintiff filed under seal.

10. In the event the Court rules that the City's Building Maintenance Code is not preempted by state law, the Court shall then open and enter the Judgment in Favor of Defendant filed under seal.

11. In accordance with the parties' settlement agreement, Counts III, IV, V, VI, VII, and VIII of plaintiffs' Complaint may and should be dismissed with prejudice and without costs being awarded to any party.

12. In accordance with the parties' settlement agreement, Processing Solutions Limited, Bernard C. Schaefer, and Robert J. Kruis may and should be dismissed as parties to this litigation, leaving as the sole remaining parties to this litigation: James D. Azzar, plaintiff, and the City of Grand Rapids, defendant.

13. Neither remaining party has waived the right to appeal this Court's ruling on the Preemption Motion, although the resolution of all other issues agreed upon by the parties is final and non-appealable.

14. If an appellate court reverses this Court's ruling on the Preemption Motion, the parties agree that the appropriate and applicable judgment filed herewith under seal may and should be entered by this Court following remand by the appellate court.

(**Apx 285a-286a**).

The circuit court accepted the parties' stipulation and dismissed all parties to the action except plaintiff James D. Azzar and defendant City of Grand Rapids. In accordance with the parties' stipulation, the sole remaining issues in the case for determination by the court were:

4. As set forth at pages 1 and 2 of plaintiffs' brief in support of motion for partial summary disposition dated April 20, 2004, this claim is based upon the following two grounds:

   a. From 1974 until July 31, 2001, the State Construction Code Act ("State Act") contained a limited ability for the City to "opt out" of following and enforcing the State Act and the State Construction Code ("the Code). The "opt out" was expressly limited, however, and required the City to adopt other nationally recognized codes. The "opt out" did not permit the City to legislate its own code, as the City did here in promulgating its own Building Maintenance Code in 1987. Accordingly, the City's code was void and unenforceable the day it was passed.

   b. Effective July 31, 2001, the limited "opt out" was removed from the State Act, replaced by the unequivocal mandate of state-wide, uniform application of the State Act and the Code, including the

> Michigan Building Code. The City admits that it is obligated to follow and enforce the Michigan Building Code. The State Act mandates that the Code "insure adequate maintenance of buildings" throughout the state. The Michigan Building Code satisfies this stated purpose by requiring that buildings be maintained in accordance with the International Property Maintenance Code. The City, though admittedly obligated to follow and enforce the Michigan Building Code, is violating State law by continuing to enforce its own Building Maintenance Code.

5. The defendants have opposed plaintiffs' motion for partial summary disposition by brief dated May 5, 2004, arguing that Res Judicata was a bar to Plaintiffs' claims, and the City of Grand Rapids, by it's statutory Home Rule City powers, had the authority to enact a Building Maintenance Code, and the Single State Construction Code did not expressly preempt the City's Building Regulations, and the Single State Construction code did not preempt the City's Building Maintenance Code.

(**Apx 284-285a**).

On January 7, 2005, the circuit court issued its opinion and order denying plaintiffs' motion for summary disposition on the issue of express preemption. Although the circuit court rejected the City's defense that *res judicata* barred plaintiff's claim, and rejected the City's evidence of legislative history, which consisted of affidavits of city representative who attended conferences, as weak at best and at worst inadmissible as "rank hearsay," the circuit court ruled that State law did not preempt the City's Building Maintenance Code. (Opinion and Order, pp 2-3)(**Apx 293a-294a**).

> There is no dispute that pursuant to the Single State Construction Act, MCL 125.1501, *et seq*, state law preempts local regulation in matters relating to construction. The issue in dispute relates to whether local building maintenance codes, such as the subject Grand Rapids Building Maintenance Code, are included in the preemption. This issue was specifically and directly addressed by 61st District Judge Jeanine Memesi Laville in the case of *City of Grand Rapids v Abney*, 61st District Court No. 02-OM-1840. In a well-written and well-reasoned opinion dated December 15, 2003, Judge Laville specifically held that the Grand Rapids Building Maintenance Code was not preempted by state law.

(Opinion and Order, pp 2-3) (**Apx 293a-294a**).

While the circuit court recognized that Judge Laville's ruling was "in no way binding or precedental," the court determined to adopt Judge Laville's opinion as its own, stating that there was no reason to "reinvent the wheel." (Opinion and Order, p 3)(**Apx 294a**). Accordingly, the circuit court ordered that: "plaintiffs' Motion for Partial Summary Disposition on the issue of preemption ought be and the same most respectfully is DENIED." (Opinion and Order, p 3) (**Apx 294a**).

As a result of the parties' settlement of all of the remaining issues in the case and pursuant to the parties' stipulation, the circuit court signed the Judgment in Favor of Defendant. Plaintiff-Appellant James D. Azzar appealed to the Michigan Court of Appeals which affirmed in an unpublished, per curium opinion on September 22, 2005. (**Apx 301a-304a**).

On October 13, 2005, plaintiff-appellant moved the Michigan Court of Appeals for reconsideration, and on December 1, 2005, the appellate court issued its order denying reconsideration. (**Apx 305a**).

On January 12, 2006, Plaintiff-Appellant James D. Azzar applied for leave to appeal the January 7, 2005 judgment of the Kent County Circuit Court, and on May 4, 2006, an order of the Court entered granting leave to appeal. Plaintiff-Appellant respectfully requests that this Honorable Supreme Court reverse the September 22, 2005 Opinion of the Michigan Court of Appeals, vacate the January 7, 2005 judgment of the Kent County Circuit Court, and remand to the Kent County Circuit Court for entry of judgment in favor of plaintiff-appellant.

II. FACTUAL BACKGROUND REGARDING THE ENGINE HOUSE AND MISDEMEANOR COMPLAINTS.

After 97 years, the City discontinued using the Engine House as a fire station in 1976. The Engine House was added to the State Historic Register in 1977, and it was officially designated as a Historic Landmark by the City of Grand Rapids in 1979.[5]

From 1976 to 1998, the City used the Engine House as a storage facility, predominantly for the Grand Rapids Public Museum. During this time period, the City failed to maintain and repair the Engine House and, as a result, the building's condition severely declined.[6]

Documents provided by the City in response to the Freedom of Information Act confirm that the City appreciated at least as of June 19, 1986, that the Engine House needed maintenance, specifically including the removal of exterior peeling paint, tuck-pointing of exterior mortar joints, and repair and painting of the windows. The City failed to address any of the foregoing items. By July of 1996, the City cited itself for its own failure to maintain the Engine House in accordance with the City's Building Maintenance Code. The Notice to Repair cited the very conditions noted by the City ten years earlier and required the City to complete repairs to the brick, mortar, exterior surfaces and windows of the Engine House not later than September 14, 1996.[7]

The City ignored its own Notice to Repair, and in October of 1996, the City issued a second citation for its failure to maintain the Engine House in compliance with the City's

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5 Complaint, ¶¶ 10-11, Apx 192a-293a.

6 Complaint, ¶ 12, Apx 193a.

7 Complaint, ¶¶ 13-14, Apx 193a.

Building Maintenance Code. The Final Notice to Repair required the City to complete repairs to the brick, mortar, exterior surfaces and windows by November 18, 1996.[8]

The City ignored the second citation, its Final Notice to Repair. Without addressing any of the repair issues that were subject to the foregoing citations, the City offered the Engine House for sale at auction in October of 1997. The City represented to the Grand Rapids Press that the Engine House was in "pristine shape." This representation was then published in the Grand Rapids Press.[9]

Before the October 1997 auction, an appraisal obtained by the City concluded that the market value for the Engine House, including land, was $36,000 to $45,000. The City imposed a minimum bid at the auction of $110,000. The City prepared and distributed an "Engine House No. 6 Fact Sheet" as part of its Information Packet given to prospective bidders at the auction. Neither the Fact Sheet nor the Information Packet disclosed to would-be bidders that the Engine House was in violation of the City's Building Maintenance Code, that the City had issued two citations to itself for its own failure to maintain, that the City had ignored its own citations, or that the City intended to criminally prosecute the buyer for the City's maintenance failures.[10]

Nor did the City's Information Packet disclose the City's other failures to maintain the Engine House, including the fact that one half of the roof liner had blown off, thereby allowing rain water to enter and damage the building, or that the City had ignored the building's plumbing and mechanical systems, causing significant damage to the historic boiler and related systems.[11]

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[8] Complaint, ¶¶ 15-16, Apx 193a.

[9] Complaint, ¶¶ 17-18, Apx 193a-194a.

[10] Complaint, ¶¶ 19-20, Apx 194a.

[11] Complaint, ¶ 21, Apx 194a.

Plaintiffs attended the auction and were the highest bidder, offering to pay the City $155,000 for the Engine House. The closing was held on June 25, 1998, and title to the Engine House was conveyed to plaintiff Processing Solutions, Limited on June 25, 1998.[12]

Plaintiffs soon learned that, contrary to the City's representations, the Engine House was not in "pristine" condition, but had been so poorly maintained that its roof had partially blown off the building and that, as a result, water was allowed to leak through the Engine House roof, destroying the second floor ceiling; causing the buckling and warping of the wood floor on the second level and even damaging and rusting the historic tin ceiling on the first floor.[13] Inspections by a mechanical contractor revealed that the building's heating system had been significantly damaged as a result of the City's maintenance failures, and the contractor concluded that the City had not heated the Engine House for a number of years, hastening the interior deterioration.[14]

Plaintiffs' work on the Engine House began in the summer of 1998 and included the addition of insulation board to the roof and the installation of a roof liner, the removal and replacement of the second floor ceiling, the restoration of the historic tin ceiling on the first floor, the installation of temporary heating followed by renovation of the boiler, radiators, and associated heating system in 1999.[15]

Notwithstanding plaintiffs' efforts at repairing and renovating the Engine House from conditions that had occurred and worsened during the City's ownership of the building, the City initiated criminal proceedings against Mr. Azzar personally in September of 1999, claiming that

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[12] Complaint, ¶ 23, Apx 195a.

[13] Complaint, ¶ 24, Apx 195a.

[14] Complaint, ¶¶ 27, Apx 195a.

[15] Complaint, ¶¶ 29-30, Apx 196a.

the brick, mortar, exterior surfaces and windows filed to comply with the City's Building Maintenance Code. At that time, plaintiffs were endeavoring to resolve a dispute with the Grand Rapids Historic Preservation Commission, which held authority over all exterior renovations to historic structures such as the Engine House. Plaintiffs sought to remove the paint from the brick exterior so as to return the Engine House to its original, predominantly cream brick exterior with red brick banding and accents over various doors and windows. The paint, which had been applied by the City, covered significant architectural features of the building and had been peeling and flaking off from the building for many years during the City's ownership. Plaintiffs sought approval of Grand Rapids Historic Preservation Commission to remove the paint though a mild blasting process. That application was denied, and plaintiffs then appeals to the State Historic Preservation Commission in accordance with the State Local Historic Districts Act, MCL 399.201.[16]

Despite the fact that plaintiff Processing Solutions was exercising its due process rights to obtain the requisite approval of the Commission and could not take any corrective action without Commission approval, the City refused to dismiss the criminal charges during plaintiff's proceedings before the Commission.[17] It was only after obtaining approval from the Commission that the City agreed to dismiss the criminal complaint.[18]

In 2001, plaintiffs continued their work on the Engine House, including significant cornice work involving painstaking and time consuming removal of multiple layers of paint and the priming and painting of substantial portions of the cornice, continued treatment of the brick in accordance with the method approved by the Historic Preservation Commission, installation

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[16] Complaint, ¶¶ 34-39, Apx 196a-197a.

[17] Complaint, ¶ 37, Apx 197a.

[18] Complaint, ¶ 40, Apx 197a.

of two central air conditioning units, and the cleaning and brushing of the windows and door in preparation for painting.[19] Nevertheless, the City again commenced criminal proceedings against Mr. Azzar in October of 2001, based upon claims that the condition of the brick, mortar, exterior surfaces and windows violated the City's Building Maintenance Code.[20]

In response to the City's 2001 Misdemeanor Complaint, plaintiffs again applied to the Historic Preservation Commission seeking approval to board the windows and doors to the Engine House as permitted by section 8.209 of the City's Building Maintenance Code, which provides as follows:

> 8.209 Exterior Windows and Doors.
>
> All exterior windows and doors shall be weather tight and in good repair or shall be secured against weather by boarding painted a color matching that of the adjacent exterior siding. (Emphasis added).

The application was made in an effort to satisfy the continuing demands by the City and as a temporary measure while the window renovation work continued. To assist the Historic Preservation Commission in its review of the application, three test boards were painted and installed.[21]

The Historic Preservation Commission denied the application. The denial was appealed to the State Historic Preservation Commission. The appeal hearing was held on February 13, 2002. Following the appeal hearing, the City undertook additional efforts to pursue Mr. Azzar,

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[19] Complaint, ¶¶ 42-45, Apx 198a.

[20] Complaint, ¶ 46, Apx 198a.

[21] Complaint, ¶¶ 47-49, Apx 199a-200a.

including the initiation of yet additional criminal proceedings and illegally searched the premises.[22]

On March 13, 2002, the City issued a third Misdemeanor Complaint against Mr. Azzar, this time claiming that the three test boards installed for the benefit of the Historic Preservation Commission review violated the City's Historic Preservation Commission Ordinance. Unlike the first and second Misdemeanor Complaints, however, which were mailed to Mr. Azzar together with an Arraignment Order instructing Mr. Azzar to appear at Court on a certain date, the City took the unusual step of issuing an Arrest Warrant with respect to the third Misdemeanor Complaint. The City dispatched Grand Rapids Police officers to Mr. Azzar's place of business in an effort to physically arrest him.[23]

Mr. Azzar, who was attending to a business matter outside his office, learned that police searching for him. Consequently, a call was placed to the City Attorney's office and a request was made that the Arrest Warrant be revoked and that the new claim simply be added to the then ongoing Misdemeanor Complaint pertaining to the City's Building Maintenance Code. The request was denied by Assistant City Attorney Bernard Schaefer, who articulated the City's desire that Mr. Azzar be physically handled by the police, handcuffed, processed, and booked.[24]

Mr. Azzar, through counsel, filed an Emergency Motion to Quash the Arrest Warrant in the 61st District Court in the ongoing matter concerning alleged violations of the City's Building Maintenance Code, Case No. 01-CM-3411. At the hearing on March 15, 2002, the District Court Judge quashed the arrest warrant, chastised the Assistant City Attorney, and consolidated the

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[22] Complaint, ¶ 50, Apx 199a.

[23] Complaint, ¶ 51, Apx 199a.

[24] Complaint, ¶ 52, Apx 200a.

alleged violation of the Historic Preservation Commission Ordinance with the ongoing Building Maintenance Code matter, Case No. 01-CM-3411.[25]

Azzar further requested that the City dismiss the charge relating to the Historic Preservation Commission Ordinance because the three test boards were removed and, further, because the ordinance was illegal inasmuch as it provided for a criminal penalty when the state legislation under which it was derived, namely the Local Historic District's Act, MCL 399.201 et seq., provided for only a civil penalty. The City refused to do so.[26]

Trial was held in Case No. 01-CM-3411 on February 18, 2003, in the 61st District Court for the State of Michigan, including the City's Misdemeanor charges pertaining to the Building Maintenance Code and the Historic Preservation Commission Ordinance. The City abandoned its claim under the Historic Preservation Commission Ordinance and went to trial strictly on its allegations that the Engine House failed to comply with the City's Building Maintenance Code, specifically Chapter 135 of the City Code, with an offense date of September 25, 2001. At the conclusion of trial, the district court ruled in favor of Mr. Azzar.[27]

III. THE CHARGES BROUGHT BY THE CITY AGAINST AZZAR.

The City criminally charged plaintiff James D. Azzar with violation of the City's Building Maintenance Code, a code the City enforces as to commercial buildings. The Misdemeanor Complaint charged James Azzar/Processing Solutions, Ltd. with the alleged failure to comply with three sections of the Building Maintenance Code, Chapter 125, Article 2, on the following counts:

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[25] Complaint, ¶ 53, Apx 200a.

[26] Complaint, ¶ 54, Apx 200a.

[27] Complaint, ¶¶ 55, 68, Apx 200a, 204a.

1. Did fail to repair the exterior brick and mortar surfaces. (8.207)

2. Did fail to remove peeling paint from exterior of the building. (8.207)

3. Did fail to protect the exterior wood, iron and steel surfaces from the weather by a properly applied water-resistant paint, stain, or finish. (8.208)

4. Did fail to repair and make weather tight exterior doors and windows. (8.209)

(Misdemeanor Complaint)(**Apx 170a**).

The pertinent sections from the Grand Rapids Building Maintenance Code read as follows:

> Sec. 8.207. Exterior Surfaces.
>
> All exterior finish surfaces shall be weather-tight, and in good repair and shall not have any holes, cracks or deterioration which allow water or vermin to reach any basic structural element or to enter the interior of any building.
>
> Sec. 8.208. Protection of Exterior Surfaces.
>
> All exterior surfaces of a building or structure made of iron, wood, steel, masonry or other materials which may deteriorate from exposure to weather shall be protected from the weather by a properly applied weather-resistant paint, stain or other waterproof finish. Primers shall be properly covered with a water-resistant finish coating.
>
> Sec. 8.209. Exterior Windows and Doors.
>
> All exterior windows and doors shall be weather tight and in good repair or shall be secured against weather by boarding painted a color matching that of the adjacent exterior siding.

(Building Maintenance Code, **Apx 100a-101a**)

The Misdemeanor Complaint charges an offense date of September 25, 2001. The building at-issue is Engine House No. 6, an historic fire station which the City sold to Processing Solutions LTD. in 1998. At trial, Mr. Azzar was acquitted of all charges.

IV. HISTORY OF THE STATE CONSTRUCTION CODE ACT.

To understand the legal underpinnings of plaintiff's motion for partial summary disposition requires an understanding of the historical development of the State Construction Code Act ("the State Act") and the State Construction Code ("the Code"). As will be demonstrated below, the State Act requires that the Code insure adequate maintenance of buildings throughout the state. The State Act also specifically authorizes that the Code may incorporate another code or standard by reference. As initially promulgated, the State Act contained a limited "opt out" provision, under which local government could elect to exempt itself from the State Act and the Code. The "opt out," however, was expressly limited. Local governments were required to adopt another nationally recognized code or codes; they could not, as the City did here, legislate their own code. In the plaintiffs' view, the City's Building Maintenance Code was void from its inception.

Moreover, the 1999 amendments to the State Act removed the option for local governments to "opt out" or exempt themselves from enforcing the State Act and Code, and expressly preempted local regulation by replacing the "opt out" provision with the clear mandate that the State Act and the Code apply throughout the state. Effective July 31, 2001, the transition to state-wide, uniform application of the State Act and Code was complete. The State Code includes the Michigan Building Code. The Michigan Building Code, in satisfying one of the express purposes of the State Act, includes maintenance standards; it requires that buildings be maintained in accordance with the International Property Maintenance Code. Thus, because the State Act and Code apply throughout the State, and because the City admittedly is obligated to follow the Michigan Building Code, it is obligated to follow the maintenance standards contained therein. In plaintiffs' view, the City's Building Maintenance Code is expressly

preempted by State law even assuming that it had been properly promulgated prior to the 1999 amendments to the State Act.

A. ESTABLISHING A COMMISSION TO PROMULGATE STANDARDS, SPECIFICALLY INCLUDING BUILDING MAINTENANCE.

In 1972, the Michigan Legislature enacted the State Construction Code Act ("the State Act"), MCL 125.1501 *et seq.* The State Act established the "state construction code commission" to prepare and promulgate the state construction code ("the Code"). MCL 125.1503. The State Act specified that "the code shall be divided into sections as the commission considers appropriate including, without limitation, building, plumbing, electrical, and mechanical sections." MCL 125.1504(4).

As initially promulgated, the State Act provided a limited "opt out" for governmental subdivisions through MCL 125.1508(1), which provided as follows: "This act and the [state construction] code apply throughout the state, **except that** a governmental subdivision **may elect to exempt** itself from certain parts of this act and the code by adopting and enforcing a nationally recognized model building code or other nationally recognized codes." MCL 125.1508(1) (emphasis added).

The State Act required a governmental subdivision to adopt the national codes "without amendment."[28] MCL 125.1508(1). Once adopted, the State Act required each governmental subdivision that "opted out" to update the codes "at least once every three years" and "submitting a certified copy of the amended ordinance to the commission." MCL 125.1508(1).

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[28] MCL 125.1508(1) (repealed effective July 31, 2001) provided, in pertinent part, as follows: "A governmental subdivision may make this election by the passage of an ordinance adopting by reference or otherwise **without amendment** a nationally recognized model building code or other nationally recognized model codes." (Emphasis added).

Consequently, in its initial form, the State Act gave the City of Grand Rapids two choices: Either follow the State Act and Code, including the Michigan Electrical Code, or exempt itself from the State Act and Code by adopting other nationally recognized model codes.

B. 1999 AMENDMENTS TO STATE CONSTRUCTION CODE ACT MANDATE STATE-WIDE ENFORCEMENT OF THE STATE CONSTRUCTION CODE.

By amendments effective December 28, 1999, there was a dramatic and purposeful shift in the State Construction Code Act, mandating state-wide enforcement of a single, uniform code: the State Construction Code. Significantly, the 1999 amendments removed the previous option for a governmental subdivision to "opt out" from enforcing the State Act and Code, as contained in MCL 125.1508. Effective July 31, 2001, the "opt out" provision contained in MCL 125.1508 was repealed, replaced by MCL 125.1508a, which expressly preempts local regulation by compelling that **"This act and the code apply throughout this state."**[29] The title to the State Act was even changed from the State Construction Code Act to the "Stille-DeRossett-Hale **single state** construction code act," (emphasis added), reflecting that the amended act mandated a single, uniform, state-wide code.

Following the 1999 amendments, the only choice for the City was whether it or the State would administer and enforce the State Act and Code.[30] In either case, the code to be applied remained the same: the State Construction Code. This shift toward absolute uniformity

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[29] MCL 125.1508a (emphasis added).

[30] MCL 125.1508a(2) requires the chief elected official of each governmental subdivision to express an intention whether it would enforce the state act and code. Failure to submit a notice of intent would result in the state taking over administration and enforcement of the state act and code. MCL 125.1508b further provides that the "director is responsible for administration and enforcement of this act and the code," except that "[a] governmental subdivision may by ordinance assume responsibility for administration and enforcement of this act within its political boundary." Gone, however, is the choice for a governmental subdivision to exempt itself from the State Act and Code.

contemplated by the 1999 amendments was completed when the Director of Consumer & Industry Services updated the State's plumbing, mechanical, electrical and building codes. These updates were completed effective July 31, 2001.[31]

Since the completion of the Code updates on July 31, 2001, the State Code has applied in every city, village, and township in Michigan. Particularly relevant here is the Legislature's unequivocal pronouncement that the State Code "shall consist of the **international building code** [among others],"[32] as adopted and modified for use in this state as the Michigan Building Code. The Michigan Building Code, in satisfying an express purpose of the State Act,[33] includes provisions insuring adequate maintenance of buildings by requiring that buildings be maintained in accordance with the International Property Maintenance Code.[34] Section 101.4.5 of the Michigan Building Code provides as follows:

> Property maintenance. The provisions of the ***International Property Maintenance Code*** shall apply to existing structures and premises; equipment and facilities; light, ventilation, space heating, sanitation, life and fire safety hazards; responsibilities of owners, operators and occupants; and occupancy of existing premises and structures.

The incorporation into the Michigan Building Code of the International Property Maintenance Code as a referenced standard, together with hundreds of other referenced standards, was expressly authorized by the Legislature. The State Act both contemplates and

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[31] Effective July 31, 2001, the Director of the Department of Consumer & Industry Services adopted, with some revision, the International Building Code, 2000 edition, to be called the Michigan Building Code.

[32] MCL 125.1504(2).

[33] MCL 125.1504(3)(e).

[34] Likewise, the international building code, adopted for use and modification by the Legislature, likewise requires owners to maintain buildings in accordance with the International Property Maintenance Code.

authorizes such incorporation by reference: "The code may incorporate the provisions of a code, standard, or other material by reference." MCL 125.1504(5).

C. CITY ADMITS IT IS BOUND TO ENFORCE THE STATE-MANDATED MICHIGAN BUILDING CODE.

For its part, the City agrees it is obligated to follow the "state-mandated" Michigan Building Code. On May 22, 2001, the City Commission passed a resolution that provided as follows: "the City of Grand Rapids declares its intention to administer and enforce the **State-mandated Michigan Building Code** . . . ." **Apx 167a** (emphasis added). Accordingly, then Mayor Logie signed a document, notifying the state of the City's "intent . . . to administer and enforce the Michigan Building Code." **Apx 168a**. Notwithstanding these admissions, the City nonetheless ignored the express maintenance provisions of the Michigan Building Code, a code it admittedly is obligated to follow.

V. THE CITY UNDERSTOOD – AND FOLLOWED – THE STATE ACT AND CODE FROM 1974 UNTIL 1987.

Following the promulgation of the State Act, the City of Grand Rapids exercised its right to "opt out." By correspondence dated November 4, 1974, the City informed the State that it "has elected to exempt itself" from the State Act and Code. **Apx 5a**. At the same time, the City submitted various ordinances for review by the State, including Ordinance No. 74-87, entitled "Building Regulations." **Apx 6a-13a**. Consistent with the mandate of the State Act, the City adopted by reference the 1970 edition of the Basic Building Code, and submitted to the State for approval the amendments to that national code, **including its maintenance provisions**. The City's ordinance provided in this regard as follows:

> 104.2. **Non-Residential Structures: Exterior Surfaces**. Every non-residential structure shall be kept in good repair and structurally sound by the owner. All wood, metal, or composition siding and all other exterior surfaces shall

be maintained weather proof and shall be properly surface coated if necessary to prevent deterioration.

104.3. **Non-Residential Structures. Maintenance of Exterior Openings.** Every window, exterior door and basement hatchway shall be kept weather tight, water tight, and rodent-proof; and shall be kept in sound working condition and in good repair.

Apx 6a.

The City followed the State Act's requirement that its codes be updated every three years by submitting to the State for approval updates to its codes. The City continued submitting to the State, as required by the State Act, its Building Regulations ordinance, which continued to include maintenance provisions. See **Apx 14a-22a** which is the City's April 5, 1978 letter to the State, together with is Building Regulations (expressly covering the area of building maintenance), Ordinance No. 77-49, and **Apx 23a-36a** which is the City's June 5, 1981 letter to the State, enclosing Chapter 131 of the City Code, entitled Building Regulations. Like Ordinance No. 77-87, Chapter 131 continued the provisions governing exterior maintenance of commercial buildings and amended Section 104.5 by inserting the requirement that "Glass in openings shall be maintained in a safe condition." Included as **Apx 37a-51a** is the City's May 17, 1982 letter to the State, enclosing Chapter 131, including its maintenance provisions. One year later, the City sent its May 17, 1983 letter to the State, together with Chapter 131 of the City Code, including provisions governing exterior maintenance of commercial buildings. **Apx 52a-68a.** In 1985, the City added definitions to Chapter 131, including a definition of "good repair," a term that appears in the maintenance provisions of Sections 104.4 and 104.5; again, the City submitted Chapter 131 to the State for review and approval. **Apx 69a-81a**. In 1986, the City again communicated with the State, advising that it had amended the local code and adopted the B.O.C.A Building Code, 1984 Edition with amendments. **Apx 82a-97a** (January 8, 1986).

As the above demonstrates, the City recognized that the State Act governed maintenance. The City complied with the requirements of the State Act for thirteen years, faithfully submitting its ordinances for review and approval by the State, including its exterior maintenance provisions.

VI. THE CITY LEGISLATES ITS OWN MAINTENANCE CODE IN AUGUST OF 1987, WHICH IN PLAINTIFF'S VIEW, VIOLATES STATE LAW.

After complying with State law for thirteen years, in 1987 the City chartered a new course. Despite the City's understanding of the State Act's requirements as made clear by the City's own conduct of compliance, the City went ahead and did what the State Act prohibits: the City legislated its own code by promulgating Chapter 135, the City's Building Maintenance Code. **Apx 98a-111a**.

The City's Building Maintenance Code, Chapter 135 of the City Code, was passed by the City Commission on August 11, 1987, at a time when the City's only choice was to enforce the State Act or Code or "opt out" by adopting other nationally recognized codes. **Apx 98a-111a**. It does not adopt any national code, but instead contains its own set of rules and regulations regarding building maintenance. In appellant's view, the Building Maintenance Code is void and of no effect in that the City of Grand Rapids lacked the authority to promulgate its own code, such power being directly restricted and curtailed by the State Act.

VII. THE CITY MAINTAINS PARALLEL CODES GOVERNING MAINTENANCE: 1987 – 1997.

After violating, in appellant's view, the State Act by promulgating its own Building Maintenance Code, the City then maintained parallel codes governing exterior maintenance of commercial buildings through both Chapter 131 and Chapter 135. By correspondence dated July 28, 1989, approximately two years **after** purporting to legislate its own Building Maintenance

Code, the City again submitted Chapter 131 to the State, which continued to include maintenance provisions concerning commercial buildings. See **Apx 112a-126a**. The inclusion of the maintenance provisions in the 1989 edition of Chapter 131 was **NOT** mere oversight because the 1989 version of Chapter 131 revised the maintenance provisions. Section 104, entitled "Maintenance," was revised to "Repairs and Maintenance" in 1989. See **Apx 113a**; compare **Apx 86a**. Although the City submitted Chapter 131 to the State for review and approval, it did not submit Chapter 135 (Building Maintenance Code) to the State.

The City then perpetuated its dual maintenance codes in both Chapters 131 and 135 for eight more years, until 1997. In the interim, the City simply ignored the State Act's requirement that the City update its codes every three years, prompting a number of threatening letters from the State, including a September 12, 1996 letter warning the City concerning its failure to update codes as required by the State Act. **Apx 127a-129a**.

> I'm sure you are well aware that enforcement of these codes without a valid ordinance places the city in a very vulnerable position, legally. How can you possibly enforce codes that have not been adopted? How can the City continue to violate state law, when it has been brought to your attention through a formal evaluation and you have been directed by the Commission to update these codes?

Apx 128a.

The City finally submitted Chapter 131 to the State in October of 1997, for the first time since 1989. The 1997 version of Chapter 131 did remove its maintenance provisions, which had been part of Chapter 131 since 1974, a total of 23 years. The City's December 26, 1997 letter to the State, together with Chapter 131, is included as **Apx 130a-141a**. The City did not, however, submit its Building Maintenance Code to the State in 1997.

VIII. THE CITY UNDERSTOOD THAT THE 1999 AMENDMENTS TOLLED THE BELL FOR THE CITY'S BUILDING MAINTENANCE CODE.

Although the City's Building Maintenance Code violated the limited "opt out" originally contained in the State Act (which limited the City to adopting nationally recognized codes), the 1999 amendments to the State Act removed the "opt out" provision and compelled state-wide application of the State Act and Code. Significantly, the City read and understood the plain meaning of the amended State Act in the same manner as the Plaintiffs.

That the City fully appreciated the impact of the 1999 amendments, and specifically that the State Act and Code precluded the City from enforcing its Building Maintenance Code (among other codes), is established through the City's own documents. **Apx 171a-190a**. The State Bureau of Construction Codes specifically informed the City that "**the International Property Maintenance Code is the mandated code for use in enforcement for all existing structures throughout the State of Michigan**."[35] **Apx 171a** (emphasis added). This is important not only from a factual perspective, but from a legal one as well. "Where an agency is charged to administer an act, . . . that agency's construction of the statute must be given deference. . . ." *County of Alcona v Wolverine Environmental Production, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998) .

In response to the 1999 amendments and the directive from the State, the City lobbied West Michigan Legislators – unsuccessfully – to change the law. The City, through its Mayor, went so far as to send a letter to then Governor Engler, imploring him to intervene on behalf of the City. **Apx 186a-187a**. The Governor did not do so. Various alternatives were outlined in the City memos, including litigation against the State. **Apx 181a-182a, 184a-185a**. Ultimately –

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[35] City's September 26, 2002 Memo from James Galford to City Manager, Kurt Kimball. **Apx 171a**.

and incredibly – the City followed the only alternative specifically cautioned against:[36] simply ignoring, and violating, state law through continued enforcement of ordinances (including the Building Maintenance Code) that the City knew violated State law.[37]

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

The standard of review of the circuit court's orders granting summary disposition is *de novo*.

> This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Guerra v. Garratt,* 222 Mich App 285, 288, 564 NW2d 121 (1997). When reviewing a motion granted pursuant to MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where

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[36] The City's Neighborhood Improvement director cautioned against ignoring State law in a September 26, 2002 memo to City Manager, Kurt Kimball (**Apx 181a-182a**, last page):

> Another course of action would be to simply ignore the Bureau of Construction Codes course of action. That is, just go on enforcing our local ordinances, refuse to acknowledge the International Property Maintenance Code or the legitimacy of the reference within the Michigan Building Code or Michigan Residential Code. Eventually someone would have to file a complaint with the State of Michigan against Grand Rapids that would trigger a process known as a performance evaluation. The State would send a letter informing us a complaint had been filed and giving us ten days to respond to the complaint. Our response would be that we were enforcing the ordinance we had adopted under our Home Rule rights. If the State did not accept it, they would then inform us they were initiating a performance evaluation of the department. Following the investigation, we would receive a letter of findings to respond to and a hearing and appeal. **We could drag it out for six months** or more and still have the opportunity to take the matter to court, while continuing to enforce our local ordinances. The risk would be that in the end, if we lost, we would fall under State jurisdiction, or worse, the State could opt to take control of Grand Rapids Enforcement operations. I advise against this course of action and include it for the sake of disclosure of all options. **Apx 181a-182a** (emphasis added).

[37] The policy edict, contained in an October 18, 2002 City Memo (**Apx 188a-190a**) concludes as follows: "In the meantime [while the City pursues a legislative change], it is now the policy and directive of this department and the City that the International Property Maintenance Code is not to be utilized in the exercise of your duties. If a change in this directive occurs I will inform staff of that." **Apx 190a**.

> appropriate, construe the pleadings in favor of the plaintiff. *Smith v. YMCA of Benton Harbor/St. Joseph,* 216 Mich App 552, 554, 550 NW2d 262 (1996).

Rheaume v. Vandenberg, 232 Mich App 417, 420; 591 NW2d 331 (1998)

Statutory construction is a question of law which is also reviewed *de novo*.

> We conduct a review de novo of the trial court's grant of summary disposition. *Coleman v. Kootsillas,* 456 Mich 615, 618, 575 NW2d 527 (1998). Whether a cause of action is barred by a statute of limitations is, absent disputed issues of fact, a question of law that we review under the same standard. *Todorov v. Alexander,* 236 Mich App 464, 467, 600 NW2d 418 (1999). The interpretation of statutes is also a question of law that we consider de novo. *Oakland Co. Bd. of Co. Rd. Comm'rs v. Michigan Property & Casualty Guaranty Ass'n,* 456 Mich 590, 610, 575 NW2d 751 (1998).

Colbert v. Conybeare Law Office, 239 Mich App 608, 613-614; 609 NW2d 208 (2000)

Whether a state statute preempts a local ordinance is a question of statutory interpretation, which presents a question of law that this Court reviews de novo. *Michigan Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003).

II. EXPRESS PREEMPTION.

The City of Grand Rapids derives its power to regulate its affairs from the State; it lacks inherent power. The Home Rule City Act, MCL 117.1 *et seq* is a grant of such power by the State to municipalities, as limited by the Constitution and State law. "Under the [Home Rule City] act, cities derive their power from the state . . . ." *Tally v City of Detroit*, 54 Mich App 328, 334; 227 NW2d 214 (1974). "The city is given a general grant of rights and power subject to certain restrictions." *Id.* "Except as limited by the Constitution or by statute, the police power of Detroit as a home rule city is of the same general scope and nature as that of the State." *Id.* (Emphasis added). See also, *People v Sell*, 310 Mich 305; 17 NW2d 193 (1945).

"[W]here the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted." *People v Llewellyn*, 401 Mich 314, 323; 270 NW2d 471 (1977), ; see also *Noey v City of Saginaw*, 271 Mich 595; 261 NW 88 (1935). Here, as originally promulgated, the State Act prohibited the City from promulgating its own codes by expressly limiting the City's ability to "opt out" by requiring it to adopt national codes. Moreover, the 1999 amendments to the State Act removed the ability of local government to "opt out" of the State Act and Code; the "opt out" was replaced by the unequivocal mandate that "[t]his act and the code apply throughout the state." MCL 125.1508a. The Legislature's intent is clear: There is to be a single code that applies uniformly throughout the State of Michigan, without local variation.

III. STATUTORY CONSTRUCTION.

The main goal when interpreting a statute is to give effect to the Legislature's intent, as expressed in the language of the statute itself. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 533; 669 NW2d 594 (2003). In giving effect to the Legislative intent, courts review the plain meaning of the statutory language. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). If the statutory language is unambiguous, it is presumed that the Legislature intended the clearly expressed meaning, and judicial construction is neither permitted nor required. *STC, Inc, supra*, at 533; *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

However, if reasonable minds could differ with respect to the language's meaning, the language is ambiguous, and judicial construction is necessary. *In re MCI*, 460 Mich 396, 411 (1999). "Where ambiguity exists ... [a] Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be

accomplished." *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001) (emphasis added), citing *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

Courts must avoid construing statutes to yield "absurd or self-defeating consequences." *Haas v Ionia*, 214 Mich App 361, 364; 543 NW2d 21 (1995). When construction is permissible, a court must reasonably construe the statute in a manner that will best effect its purpose, not defeat it. *Stover v Retirement Board of St. Clair Shores*, 78 Mich App 409, 412; 260 NW2d 112 (1977).

IV. THE CITY'S BUILDING MAINTENANCE CODE WAS VOID FROM INCEPTION.

Without considering the 1999 amendments, the State Act, as originally promulgated, expressly preempted local regulation by prohibiting a governmental unit from legislating its own codes. At all times – from its inception through today – one of the stated purposes of the State Act was to "insure adequate maintenance of buildings . . . to adequately protect the health, safety, and welfare of the people."[38] As initially promulgated, the State Act prohibited municipal governments from promulgating their own regulations by providing as follows: "This act and the [state construction] code apply throughout the state, except that a governmental subdivision may elect to exempt itself from certain parts of this act and the code by adopting and enforcing a nationally recognized model building code or other nationally recognized codes." MCL 125.1508(1) (now repealed). This "opt out" provision was expressly limited to adopting other nationally recognized codes; but a municipal government could not promulgate its own codes, as

[38] MCL 125.1504(3)(e).

the City purported to do in August of 1987, when it legislated its own Building Maintenance Code.

Consequently, the State Act, as initially promulgated, gave the City of Grand Rapids two choices: Either follow the State Construction Code (i.e., the Michigan Building Code) or exempt itself from the Code by adopting, without amendment, a nationally recognized model building code or other nationally recognized model codes. But the language makes clear that the City could not simply legislate its own code as the City of Grand Rapids did here in developing its own Building Maintenance Code. Accordingly, and as a matter of law, the City's Building Maintenance Code was void and of no effect when initially promulgated in August of 1987.

V. THE CIRCUIT COURT ERRED IN HOLDING THAT EXPRESS PREEMPTION APPLIES TO THE SUBJECT MATTER OF THE SIX CODES LISTED IN THE STATUTE BUT NOT TO THE GRAND RAPIDS BUILDING MAINTENANCE CODE, AS THE 1999 AMENDMENTS EXPRESSLY PREEMPT ALL LOCAL REGULATION BY COMPELLING STATE-WIDE APPLICATION AND ENFORCEMENT OF THE STATE ACT AND CODE, BOTH OF WHICH HAVE AS THEIR SUBJECT, MAINTENANCE.

Although the City's Building Maintenance Code was unlawful from inception, the amendments to the State Act in 1999 provide yet an additional ground for summary disposition on the issue of express preemption. The 1999 amendments removed the limited "opt out" provision contained in MCL 125.1508. Effective July 31, 2001, MCL 125.1508 was repealed,[39]

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[39] The pocket part to the Michigan Compiled Laws provides as follows with respect to 125.1508:

Repeal

This section was repealed on July 31, 2001, the effective date of the last of the rules updating specific codes of the Michigan Administrative Code, promulgated after October 15, 1999, under the provisions of P.A. 1999, No. 245, § 2.

replaced by MCL 125.1508a, which expressly preempts local regulation by compelling as follows: "This act and the code apply throughout the state." MCL 125.1508a(1).

In the December 15, 2003 Opinion of Judge Laville, adopted by the circuit court as its own, the circuit court correctly ruled that the amendments to the State Act compelled state-wide, uniform application of the State Act and Code and, specifically, that any local codes regulating the "subject matter" of the six codes listed in MCL 125.1504(2) – including the international building code – are "expressly preempted."

> In this case, the defendant argues that the Michigan Single State Construction Act, MCL 125.1501 et seq ["the state act" herein] preempts the city Building Maintenance Code. As of July 1, 2002, [sic] that act repealed the statute [footnoting MCL 125.1508] permitting a local unit of government to enforce its own construction code. After that date, the state act provides that "This act and the code apply throughout the state." MCL 125.1508a(1). The Act further provides:
>
> > . . . the code shall consist of the international **residential code**, the international **building code**, the international **mechanical code**, the international **plumbing code** published by the international code council, the national **electrical code** published by the national fire prevention association, and the Michigan uniform **energy code** with amendments, additions, or deletions as the director determines appropriate. MCL 125.1504(2). [Emphasis added by trial court].
>
> **Any local codes regulating the subject matter of the six codes cited in the above provision are thus expressly preempted**. (Emphasis added).

Apx 297a.

There is no question, however, that building maintenance is a subject matter of both the State Act and the Code. A stated purpose of the State Act is (and has always been) that the Code "insure adequate maintenance of buildings throughout the state." MCL 125.1504(3)(e). Through the 1999 amendments, the Legislature specifically required that the Code include the

"international building code . . . with amendments, additions, or deletions as the director[40] determines appropriate." MCL 125.1504(2).

Like the State Act, building maintenance is an express subject matter of the International Building Code, specifically adopted by the Michigan Legislature[41] through the amendments to the State Act. The subject matter of the International Building Code is set forth in section 101.2, and addresses the use, repair and maintenance of buildings:

> **101.2 Scope**. The provisions of the *International Building Code* shall apply to the construction, alteration, movement, enlargement, replacement, ***repair***, equipment, ***use*** and occupancy, location, ***maintenance***, removal and demolition of every building or structure or any appurtenance constructed or attached to such buildings or structures.

Apx 143a (emphasis added; unbolded italics in original).

The identical scope, or subject matter, likewise appears as section 101.2 of the Michigan Building Code. **Apx 146a**. The International Building Code further satisfies the express requirement of the State Act that the Code insure adequate maintenance of buildings:

> **101.4.5 Property Maintenance**. The provisions of the *International Property Maintenance Code* shall apply to existing structures and premises; equipment and facilities; light, ventilation, space heating, sanitation, life and fire safety, hazards; responsibilities of owners, operators and occupants; and occupancy of existing premises and structures.

Apx 143a.

The International Building Code was updated for use in Michigan and is published as the Michigan Building Code. Like the International Building Code, the Michigan Building Code likewise includes section 101.4.5 and its requirement that existing structures be maintained in

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[40] "Director" means the director of the Department of Consumer and Industry Services or an authorized representative of the director. MCL 125.1502a(1)(o) and (p).

[41] Subject to "amendments, additions, or deletions as the director determines appropriate." MCL 125.1504(2).

accordance with the International Property Maintenance Code. **Apx 146a**. The Michigan Building Code adopts hundreds of referenced standards, including the International Property Maintenance Code as a referenced standard governing maintenance. Chapter 35 of the Michigan Code is included as **Apx 148a-166a** and lists literally hundreds of referenced standards that are incorporated into the Michigan Building Code. The adoption of such standards by reference is specifically authorized by the Michigan Legislature. The State Act both contemplates and authorizes that "The code may incorporate the provisions of a code, standard, or other material by reference." MCL 125.1504(5).

The State Act and Code expressly preempt local regulation by requiring state-wide, uniform application of the State Act and Code; the State Act provides that one of the purposes of the Code is to provide standards to "insure adequate maintenance of buildings;"[42] the Legislature adopted the International Building Code,[43] which expressly governs building maintenance through the International Property Maintenance Code as a referenced standard; the Michigan Building Code, in carrying out the express mandate of the State Act, likewise governs building maintenance through the International Property Maintenance Code; and, finally, the State Act specifically authorizes that the Code may incorporate another code or standard by reference. MCL 125.1504(5). Accordingly, the State Act and Code preempt local regulation by compelling, in the area of building maintenance, that buildings be maintained as required by the International Property Maintenance Code. State law thus expressly preempts the City from enforcing its own Building Maintenance Code.

The circuit court's limitation, as expressed in the adopted December 15, 2003 opinion, of express preemption to the matters not involving maintenance is in error and contradicts its

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[42] MCL 125.1504(3)(e).

[43] MCL 125.1504(2).

holding that local codes which regulate the subject matter of the six codes cited in the statute are preempted. The court held:

> **Any local codes regulating the subject matter of the six codes cited in the above provision [MCL 125.1504(2)] are thus expressly preempted**. (Emphasis added).
>
> * * *
>
> The defense notes that the international building code, cited in the above provision and recodified as the Michigan Building Code, incorporates by reference the International Property Maintenance Code. Because the International Property Maintenance Code regulates the same subject matter as the city Building Maintenance Code, the defense argues that the city Building Maintenance Code is preempted as well. However, section 102.2 of the Michigan Building Code provides that:
>
> > The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law.
>
> Thus, although the Michigan Building Code incorporates the International Property Maintenance Code, it does so with the provision that local law is not preempted. The express preemption in the state act is limited to the subject matter of the six codes listed therein. Therefore, I find no express preemption of the city Building Maintenance Code.

Apx 298a

The court therefore came to the irreconcilable ruling that the Michigan Building Code expressly preempts local regulation, but the maintenance requirements contained therein do not. Such a ruling cannot stand because it ignores the language of the State Act itself, MCL 125.1504(3)(e), stating that one of the purposes of the Code was to provide standards to "insure adequate maintenance of buildings;" it ignores the fact that the Legislature adopted the international building code,[44] which expressly governs building maintenance through the International Property Maintenance Code; it ignores the fact that the Michigan Building Code, in carrying out the express mandate of the State Act, likewise governs building maintenance

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[44] MCL 125.1504(2).

through the International Property Maintenance Code; and, finally, it ignores the grant of authority in the State Act that the Code may incorporate another code or standard by reference. MCL 125.1504(5).

VI. AS A MATTER OF LAW, SECTION 102.2 OF THE MICHIGAN BUILDING CODE MUST BE HARMONIZED WITH THE STATE ACT OR, IF IN CONFLICT, YIELDS TO THE STATE ACT.

The City will make the conflicting argument that while it is obligated to follow the Michigan Building Code, it can ignore both the Act and the Code by virtue of section 102.2 of the Michigan Building Code, which provides as follows: "The provisions of this code shall not be deemed to nullify any provision of local, state or federal law." **Apx 146a**.

An administrative rule like Section 102.2 must be construed, if at all possible, in harmony with the enabling legislation under which it was created.[45] But if Section 102.2 cannot be read in a manner consistent with the State Act, then the rule is deemed invalid and, as a matter of law, yields to the State Act.

Section 102.2 of the Michigan Building Code (a carry over provision from the International Building Code) can be read to harmonize with the State Act's mandate of state-wide, uniform application of the State Act and Code. The Code merely reiterates the legal truism that the Code cannot directly affect a municipality's authority. Only the Michigan Legislature can affect that authority. The City derives its authority from the Legislature. Here, the Michigan

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[45] See *Detroit Base Coalition for Human Rights of Handicapped v Department of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1988) (interpretation of the Michigan Building Code requires application of the "principles of statutory construction."), and *Macomb County Prosecutor v Murphy*, 464 Mich 149, 159-160 (2001) ("We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." * * * "[T]he interpretation to be given to a particular word in one section [is] arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole.").

Legislature clearly stated its intent that the State Act and Code apply throughout the state, without the ability of local governmental units to "opt out." The City cannot argue that Section 102.2 **authorizes** the City's Building Maintenance Code in contravention of the Legislature's express intent. An administrative rule does not – indeed cannot –authorize local regulation.

The City does not derive authority to act from the Code, but rather, from the Legislature. And the Legislature has unambiguously stated through the 1999 amendments that the State Act and Code (including provisions furthering its express purpose of maintenance) apply throughout the State. While the **Code**, alone, may not directly "nullify any provisions of local, state or federal law," the State **Act** clearly preempts local regulation of the subject matter of the Code. Therefore, Section 102.2 can be read consistently with the State Act.

To the extent that this Court cannot read Section 102.2 in a manner consistent with State Act, then that section is invalid as a matter of law. The validity of an administrative rule, such as Section 102.2 of the Michigan Building Code, is determined under a three-part test: 1) whether the rule is within the subject matter of the enabling statute; 2) whether it complies with the legislative intent underlying the enabling statute; and 3) whether it is arbitrary and capricious. *Dykstra v Director Dept Natural Resources*, 198 Mich App 482, 484; 499 NW2d 367 (1993).

As stated by the court in *Dykstra*, the second question of the above test requires the court to review the legislative scheme "and to ascertain the plain meaning of the statute." *Dykstra*, 198 Mich at 486. When statutory language is clear and unambiguous, judicial interpretation to vary the plain meaning of the statute is precluded. *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 5; 489 NW2d 115 (1992). Further, when statutory construction is permissible, courts must reasonably construe the statute in a manner to best affect its purpose,

not defeat it. *Stover v Retirement Board of St. Clair Shores*, 78 Mich App 409, 412 (1977) (emphasis added).

In *Lake Isabella Development, Inc v Village of Lake Isabella*, 259 Mich App 393; 675 NW2d 40 (2003), the court invalidated an administrative rule, again following the three-part test in *Dykstra*. The rule at issue was the Michigan Department of Environmental Quality Rule 33, which conditioned the issuance of permits for private sewage systems on the local municipality first agreeing to take over the private wastewater disposal system in the event it was not properly maintained. The court invalidated Rule 33, finding that the administrative rule was "contrary to the legislative intent underlying the enabling statute." *Lake Isabella*, 259 Mich App at 407.

The application of the *Dykstra* test to this case is similarly straight-forward. If Section 102.2 contradicts the express intent of its enabling statute, the State Act, then it is invalid. If Section 102.2 cannot be read in harmony with the State Act, then it is invalid as a matter of law.

VII. THE DECEMBER 15, 2003 OPINION GIVES IMPROPER TREATMENT AND ERRONEOUS CONSIDERATION OF LEGISLATIVE INTENT.

As stated above, courts effectuate the Legislature's intent as expressed in the language of the statute itself. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 533 (2003). If the statutory language is unambiguous, judicial construction is neither permitted nor required. *Id.* Here, the State Act unambiguously mandates that the Code provide standards insuring adequate maintenance of buildings. The Michigan Building Code, adopted at the direction of the Legislature, likewise carries out this mandate by requiring that buildings be maintained in accordance with the International Property Maintenance Code. While ignoring the unambiguous mandate of uniformity contained in the State Act, the December 15, 2003 opinion instead purported to glean "legislative history" not from the law at issue, but instead from House Bills 4834 and 4835, two bills that were never the subject of a vote by either the House or Senate.

As noted by the Michigan Supreme Court, "legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). Such an endeavor "is doubly fraught with danger in Michigan which, unlike Congress, has failed to create an authoritative legislative record." *People v Tolbert*, 216 Mich App 353, 360, n 5; 549 NW2d 61 (1996). But here, while the court failed to acknowledge the express mandate of the State Act and the Michigan Building Code regarding maintenance, it instead looked to legislative history not from the State Act, but from House Bills 4834 and 4835.

The 1999 amendments to the State Act were made through Senate Bill 463. Before Senate Bill 463 was enacted into law, House Bills 4834 and 4835 were introduced in the House and immediately referred to – and died in – committee. The House Bills were very likely abandoned because the 1999 amendments to the State Act (through Senate Bill 463) mandated state-wide application of the State Act and the Michigan Building Code, expressly including building maintenance.

The court erred by concluding that the Legislature decided "not to include property maintenance in its statewide construction regulation . . . ."[46] Neither House Bill made it out of committee; they were never voted upon by either the House or Senate. "[L]egislative history is afforded little significance when it is not an official view of the legislators, **and legislative history may not be utilized to create an ambiguity where one does not otherwise exist**." *In re Estate of Seymour*, 258 Mich App 249, 254; 671 NW2d 109 (2003) (emphasis added).

In the present case, the circuit court need only have looked to the language of the State Act itself, which makes clear that one of the purposes of the Code was to "insure adequate

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[46] **Apx 298a.**

maintenance of buildings." MCL 125.1504(3)(e). As in the State Act, building maintenance is a specific subject matter covered by the Michigan Building Code. The State Act and the Code are clear and unequivocal: State law governs building maintenance and expressly preempts local regulation.

VIII. EVEN UNDER THE ANALYSIS EMPLOYED BY THE MICHIGAN COURT OF APPEALS, THE SECTIONS OF THE BUILDING MAINTENANCE CODE UNDER WHICH PLAINTIFF-APPELLANT WAS CHARGED ARE PREEMPTED BY THE MICHIGAN BUILDING CODE.

The September 22, 2005 opinion of the Michigan Court of Appeals addressed the issue of preemption differently, employing an analysis that was not utilized by the circuit court nor argued by the parties. The appellate court reasoned in pertinent part that:

> As amended by 1980 PA 371, MCL 125.1524 provided for "construction regulations" to be repealed and rendered invalid after the promulgation of the state construction code, except as provided in MCL 125.1508. The word "construction regulation" was defined in MCL 125.1502(1)(m) [now MCL 125.1502a(1)(m)] as including an ordinance or code adopted by a city, "relating to the design, construction, or use of buildings and structures and the installation of equipment in the building or structure."
>
> Hence, the relevant inquiry is whether particular ordinance provisions in the BMC were invalid "construction regulations" within the meaning of MCL 125.1524.

Apx 303a.

The Court of Appeals noted that plaintiff-appellant's challenges had not addressed individual provisions, but rather plaintiff-appellant had challenged the entire Building Maintenance Code, and accordingly the Court limited its review to the Building Maintenance Code ("BMC") as a whole. The Court held that, "Limiting our review to plaintiffs' claim that the BMC, as enacted in 1987, was expressly preempted by the Construction Act, MCL 125.1504

and MCL 125.1508, we hold that the plain language of these statutory provisions does not support plaintiffs' claim." **Apx 303a**.

While it is true that plaintiff-appellant challenged the entire Building Maintenance Code, it is equally true that the only provisions of that code relevant to the present case were those under which plaintiff-appellant was charged. The defendant-appellee City charged plaintiff-appellant with the alleged failure to comply with three sections of the Building Maintenance Code, Chapter 125, Article 2, on the following counts:

> 1. Did fail to repair the exterior brick and mortar surfaces. (8.207)
>
> 2. Did fail to remove peeling paint from exterior of the building. (8.207)
>
> 3. Did fail to protect the exterior wood, iron and steel surfaces from the weather by a properly applied water-resistant paint, stain, or finish. (8.208)
>
> 4. Did fail to repair and make weather tight exterior doors and windows. (8.209)

Apx 170a.

The pertinent sections from the Grand Rapids Building Maintenance Code read as follows:

> Sec. 8.207. Exterior Surfaces.
>
> All exterior finish surfaces shall be weather-tight, and in good repair and shall not have any holes, cracks or deterioration which allow water or vermin to reach any basic structural element or to enter the interior of any building.
>
> Sec. 8.208. Protection of Exterior Surfaces.
>
> All exterior surfaces of a building or structure made of iron, wood, steel, masonry or other materials which may deteriorate from exposure to weather shall be protected from the weather by a properly applied weather-resistant paint, stain or other waterproof finish. Primers shall be properly covered with a water-resistant finish coating.

> Sec. 8.209. Exterior Windows and Doors.
>
> All exterior windows and doors shall be weather tight and in good repair or shall be secured against weather by boarding painted a color matching that of the adjacent exterior siding.

Apx 100a-101a.

As the undersigned reads the opinion of the Michigan Court of Appeals, the Court's holding regarding the validity of the BMC as enacted in 1987 supplies the requisite analysis for holding that the BMC remained valid following the 1999 amendments to the Construction Act, since neither MCL 125.1504 as amended, nor MCL 125.1508a, as added, "contains a statement of express preemption." **Apx 303a**. The Court proceeded to apply and analyze the *Llewellyn* guidelines and held that "the Construction Act, as amended by 1999 PA 245, was not intended to occupy the field of property maintenance to the exclusion of any local regulation." **Apx 304a**.

As pointed out to the appellate court in plaintiff-appellant's motion for reconsideration, neither the parties nor the lower court analyzed the case in the manner analyzed by the Court of Appeals, and the first mention of MCL 125.1524 or MCL 125.1502(1)(m) [now MCL 125.1502a(1)(m)] in this case was by the Court of Appeals in its September 22, 2005 opinion. Neither the parties nor the lower court analyzed the question of the validity of the BMC with either of these sections in mind.

Nevertheless, as stated in plaintiff-appellant's motion for reconsideration, the term "construction" is a defined term. While MCL 125.1502(1)(m) does, as the Court of Appeals observed, define the term "construction regulation" as including an ordinance or code adopted by a city, "relating to the design, construction, or use of buildings and structures and the installation of the equipment in the building or structure," the term "construction" is itself a defined term. MCL 125.1502(1)(l) defines "construction" to mean the "construction, erection, reconstruction, alteration, conversion, demolition, repair, moving, or equipping of buildings or structures."

Accordingly, MCL 125.1502(1)(m) not only could but must be read to define "construction regulation" to include any ordinance or code adopted by a city, "relating to the design, construction, *repair*, or use of buildings and structures" since the term "construction" includes the term "repair."

Both Count I and Count II of the Misdemeanor Complaint filed by the City against plaintiff-appellant expressly assert that plaintiff-appellant "did fail to repair," and it is difficult to comprehend how these charges cannot be aptly described as "relating to the design, construction, repair, or use of buildings and structures" under MCL 125.1502(1)(m). Similarly, the alleged failure to remove peeling paint (Count II) and the failure to protect the exterior surfaces by a properly applied water-resistant paint, stain, or finish (Count III) are also fairly characterized as the failure to "repair". While one could surely characterize the activity of scraping peeling paint and repainting the surface with a water-resistant paint as "maintenance," plaintiff-appellant respectfully submits that a more accurate characterization is "repair."[47]

The same is true regarding the provisions of the BMC under which plaintiff-appellant was charged. Both Sections 8.207 and 8.209 require that an aspect of the building structure be in "good repair." Section 8.208, while not using the phrase "in good repair," may easily be restated generally as requiring that all exterior surfaces of a building or structure which may deteriorate from exposure to weather shall be repaired. It is interesting to note that any contrary construction, e.g. that Section 8.208 only requires uncovered exterior surfaces composed of

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[47] The City itself framed the dispute as one over "maintenance and repair" in its September 30, 2002 correspondence to Governor Engler.

"The matter of property maintenance ***and repair*** is very important to Grand Rapids and many other local governments. It is a local issue that needs to be resolved according to unique local conditions, history, culture, resources, and priorities. It is <u>not</u> construction." **Apx 186a** (emphasis added, but underline in original). This is simply incorrect, since the term "construction" is defined by the Legislature to include "repair," and the Act compels the Code to provide for maintenance.

materials that may deteriorate from exposure to weather to be protected by paint, stain, or other water proof finish, leads to the conclusion that Section 8.208 is really regulating construction. In other words, if the Michigan Building Code allowed a new building to have unprotected exterior surfaces, the BMC would be countermanding the Michigan Building Code by insisting on a protective covering when none was required.[48]

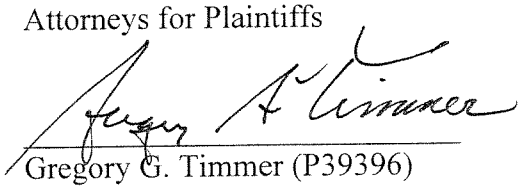
Under the analysis utilized by the Court of Appeals, the question becomes whether these three provisions of the BMC and the charges brought against plaintiff-appellant *relate to the* design, construction, *repair*, or use *of buildings and structures*" under MCL 125.1502(1)(m). If so, these sections of the BMC are "construction regulations" which are "considered superseded" under MCL 125.1524. Plaintiff-Appellant respectfully submits that these sections of the Building Maintenance Code are "construction regulations" because they "relat[e] to the design, construction, *repair*, or use of buildings and structures" under MCL 125.1502(1)(m), and they are superseded and preempted by the Michigan Building Code.

RELIEF REQUESTED

Plaintiff-Appellant James D. Azzar respectfully requests that this Honorable Supreme Court reverse the September 22, 2005 Opinion of the Michigan Court of Appeals, vacate the January 7, 2005 judgment of the Kent County Circuit Court, and remand to the Kent County Circuit Court for entry of judgment in favor of plaintiff-appellant.

RHOADES McKEE
Attorneys for Plaintiffs

Dated: June 29, 2006

By: 
Gregory G. Timmer (P39396)

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[48] The Michigan Building Code does in fact require a "water resistant exterior wall envelope." Michigan Building Code sec. 1403.